UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

HANSEN BEVERAGE COMPANY, a Delaware corporation, Plaintiff, vs. DSD DISTRIBUTORS, INC., a Wisconsin Corporation, Defendant.	CASE NO. 08cv0619-LAB (RBB) **ORDER GRANTING DEFENDANT'S MOTION TO DISMISS OR STAY PETITION TO CONFIRM ARBITRATION AWARD** [DOC. NO. 5]

This action for confirmation of an arbitration award, relying on the Federal Arbitration Act ("FAA"), 9 U.S.C. § 9, and the parties' contractual arbitration provision, is before the Court on the motion of Defendant DSD Distributors, Inc. to dismiss or stay Plaintiff Hansen Beverage Company's Petition To Confirm Arbitration Award. Defendant asserts that this Court lacks subject matter jurisdiction because Plaintiff cannot meet the amount-in-controversy requirement to obtain diversity jurisdiction. DSD further contends the case should be dismissed or stayed pending resolution of a parallel Wisconsin state court action to partially vacate the arbitration award.

Defendant's Motion [doc. no. 5] was filed on April 16, 2008, and an Opposition [doc. no. 7] was filed by Plaintiff on May 23, 2008. On June 2, 2008, DSD filed a Reply [doc. no.

9]. The Motion was thereafter taken under submission pursuant to Civil Local Rule 7.1(d)(1). [Doc. No. 10.] After the Motion as taken under submission, Hansen filed an Ex Parte Application requesting permission to file a short surreply [doc. no. 11], which Defendant opposed [doc. no. 15]. Hansen's Ex Parte Application is hereby GRANTED; the Court has considered both the Surreply and DSD's Response in deciding the present Motion. Finally, Defendant has also filed a Supplemental Declaration of Julie Lewis [doc. no. 16], a Second Supplemental Declaration of Julie Lewis [doc. no. 17], and a Supplemental Declaration of Leila Nourani [doc. no. 18]. Defendant's three supplemental declarations were filed to update the Court regarding the status of the proceedings in Wisconsin state court.

Defendant's Motion contains a request that the Court take judicial notice of the documents attached to the Declaration of Leila Nourani. (DSD's Mem. P. & A. Supp. Mot. 2 n.1.) Plaintiff objects to the Exhibit A to the Nourani declaration, which is a Motion filed in Wisconsin state court dated April 4, 2008 with exhibits attached. (See Hansen's Objection to Request for Judicial Notice [doc. no. 7-4].) Hansen alleges the document is not complete because several of the exhibits are not attached. A complete copy of the document is attached as Exhibit 1 to the Declaration of Tanya Schierling [doc. no. 7-2]. Plaintiff's objection is sustained; the Court will consider the complete Motion attached to the Schierling declaration rather than the abridged version attached to the Nourani declaration. The remaining documents of which judicial notice is requested consist of documents, including motions and orders, filed in the Wisconsin state court action and a separate lawsuit in the Central District of California. The Court grants the parties' requests to take judicial notice of these documents. See Kolocotronis v. Benefits Health Care, 2007 WL 2710366, at *3 n.3 (D. Mont. Sept. 13, 2007) (citing inter alia Smith v. Duncan, 297 F.3d 809, 815 (9th Cir. 2002) ("The Court may take judicial notice of matters of public record . . . , including pleadings or documents filed in state or federal courts").

After reviewing the arguments of counsel and the evidence submitted, and for the reasons expressed below, Defendant's Motion is GRANTED.

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I. Background

Plaintiff Hansen Beverage Company is a beverage manufacturer based in California, and Defendant DSD is a beverage distributor in Wisconsin. On December 1, 2004, the parties entered a distribution agreement, under which DSD was permitted to distribute eight specifically-listed Hansen products, including three products in the "Monster Energy" line, in certain areas of Wisconsin. (See Distrib. Agreement Exs. A, B.) The contract included an arbitration provision which provided that any disputes arising from the contract would be settled by binding arbitration "conducted by JAMS/Endispute ('JAMS') in accordance with JAMS Comprehensive Arbitration Rules and Procedures" in California. (Distrib. Agreement ¶ 19.) It further provided, "Judgment upon any award rendered may be entered in any court having jurisdiction thereof." (Id.)

On April 25, 2007, Hansen served DSD with a demand for arbitration in San Diego, California. (Schierling Decl. Ex. 1 at 54-55.) Plaintiff alleged DSD had breached the distribution agreement by distributing a competing product. (Id. at 25, 35.) Hansen sought damages for breach of contract and a declaration that the Wisconsin Fair Dealership Law did not apply to the parties' business relationship and Hansen was entitled to terminate the distribution contract. (Id. at 59-60.) The same day, Hansen also filed a complaint in the U.S. District Court for the Central District of California seeking a declaration that the arbitration clause was valid, enforceable, and binding with regard to the parties' dispute. (Id. at 30-38.) Thereafter, DSD filed suit in Wisconsin state court on July 20, 2007, seeking a declaration that the Wisconsin Fair Dealership Law applied to the dispute. (Schierling Decl. Ex. 2 at 2.) DSD also sought a temporary injunction preventing any other distributors from distributing Hansen products within DSD's territory. (Id. at 11-13.) Upon Hansen's motion, the Wisconsin state court stayed proceedings to permit the arbitration and the federal lawsuit pending in the Central District to go forward. (Nourani Decl. Exs. C, D.)

The parties proceeded to arbitration before the Honorable J. Richard Haden, retired judge and arbitrator for JAMS. An evidentiary hearing was held on January 22-25, 2008, and an interim award was issued on February 21, 2008. Due to the arbitration, the action in the

Central District was dismissed as moot on April 1, 2008. (Nourani Decl. Ex. F.) In the arbitration proceedings, DSD asserted that Hansen's breach of contract claims were without merit, and additionally it sought a determination that DSD was entitled to distribute a new product manufactured by Hansen -- "Java Monster" -- and that Hansen had constructively terminated the contract by hiring a different distributer for Java Monster in DSD's exclusive territory. (Id. at 72-75.)

The final arbitration award was issued on April 4, 2008. (See Final Award [doc. no. 4, filed under seal].) The arbitrator found DSD was protected as a "dealer" under the Wisconsin Fair Dealership Law, DSD had not breached the dealership contract, and Hansen did not have good cause to terminate the contract. (Final Award at 17-18.) Judge Haden also found, however, that DSD was not entitled to distribute the Java Monster product and Hansen did not constructively terminate the contract. (Id. at 18.) Thus, no monetary damages or attorneys' fees were awarded to either party. (Id.)

On April 4, 2008, the day the final arbitration award was issued, DSD filed a motion in the Wisconsin state court action to partially vacate or modify the award, alleging that the denial of damages or attorneys' fees to DSD violated Wisconsin public policy. (Schierling Decl. ¶ 2, Ex. 1.) Also on April 4, 2008, Hansen filed its Petition to Confirm Arbitration Award in this Court. The present Motion to Dismiss or Stay was filed on April 16, 2008.

On May 15, 2008, the Wisconsin state court issued an order declining to exercise jurisdiction over Defendant's motion to partially vacate the arbitration award. (Lewis Decl. Supp. Reply Ex. A at 5-7.) The order stated the following:

> [I]t is my opinion that the arbitration should be completed and finalized in Federal Court in the State of California without intervention of this Court. After the matter has been completed, if there still exists issues to be determined by this Court, we will entertain those issues. However, to do so at this point is premature.
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> It is my understanding that there will be a hearing in federal court regarding the arbitrator's decision. It is my further understanding that that will take place in June, 2008. After the determination has been made, any party who wishes to come before this Court for what you believe would be further relief under the jurisdiction of this Court may do so.

(Id. at 7.) DSD petitioned for leave to appeal the Wisconsin court's order, but leave to

appeal was denied. (Id. at 3; Supplemental Lewis Decl. Ex. A.) DSD then moved for reconsideration, which was denied on August 26, 2008. (Supplemental Nourani Decl. Ex. A.)

II. Discussion

A. Actions to Confirm Arbitration Awards

Arbitration awards only have force and effect when they are converted into a court order or judgment through a petition to confirm. When presented with a petition to confirm an award, the district court "must grant such an order unless the award is vacated, modified, or corrected . . . ." Id. "The Federal Arbitration Act, 9 U.S.C. §§ 1-16, enumerates limited grounds on which a federal court may vacate, modify or correct an arbitral award. Neither erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard." Kyocera Corp. v. Prudential-Bache Trade Servs., Inc., 341 F.3d 987, 994 (9th Cir. 2003) (en banc). "Under the statute, confirmation is required even in the face of erroneous findings of fact and misinterpretations of law." Id. at 997 (internal quotation marks and citation omitted).

An application or motion to confirm, vacate, or modify an arbitration award may be made to the district court "for the district in which the award was made," unless the parties have agreed otherwise. 9 U.S.C. §§ 9, 10, 11. Nevertheless, a federal court has power to enter judgment on an arbitration award only if an independent basis for federal jurisdiction exists, because the FAA does not confer subject matter jurisdiction on the district court. 9 U.S.C. § 9.

B. Subject Matter Jurisdiction

The federal court is one of limited jurisdiction. Gould v. Mutual Life Ins. Co. of New York, 790 F.2d 769, 774 (9th Cir. 1986). The Court possess only that power authorized by the Constitution or a statute. See Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541 (1986). It is presumed that a cause lies outside this limited jurisdiction. Turner v. President of Bank of N. Am., 4 U.S. (Dall.) 8, 11 (1799). The burden of establishing subject matter jurisdiction is on the party asserting it. See Kokkonen v. Guardian Life Ins. Co. of Am., 511

U.S. 375, 377 (1994). The party asserting jurisdiction in this case is the plaintiff, as Hansen commenced the instant action in this court. Tosco Corp. v. Communities For A Better Env't, 236 F.3d 495, 499 (9th Cir. 2001) (quoting Smith v. McCullough, 270 U.S. 456, 459 (1926)) ("A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment."). The court cannot reach the merits of any dispute until it confirms its own subject matter jurisdiction. Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 93-94 (1998). "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Id. (quoting Ex parte McCardle, 74 U.S. (7 Wall.) 506, 514 (1868)).

DSD contends this action must be dismissed with prejudice because the Court lacks subject matter jurisdiction over Hansen's Petition to Confirm Arbitration Award. Although the FAA creates substantive law governing arbitration agreements, the statute does not confer subject matter jurisdiction on the federal courts. Southland Corp. v. Keating, 465 U.S. 1, 16 (1984); Carter v. Health Net of Cal., Inc., 374 F.3d 830, 833 (9th Cir. 2004). Accordingly, a petition under the FAA to confirm, vacate, or modify an arbitration award may be brought in federal court only if an independent basis of jurisdiction exists. Hansen claims that the Court has subject matter jurisdiction based on diversity of citizenship pursuant to 28 U.S.C. § 1332. (Pet. to Confirm Arbitration Award ¶ 1.)

In order to establish federal jurisdiction under § 1332, Hansen must establish that the plaintiff and the defendant are citizens of different states and that the amount in controversy exceeds $75,000. 28 U.S.C. § 1332. DSD agrees the first element – diversity of citizenship – is satisfied, but Defendant alleges the amount in controversy requirement is not met because Hansen's Petition seeks to confirm an arbitration award for zero damages, thus making the amount in controversy equal zero. (DSD's Mem. P. & A. Supp. Mot. 5-6.) Hansen claims the $75,000 amount-in-controversy requirement is met, even though no

monetary damages were awarded in the arbitration, because included in the final award was a determination that Hansen could not terminate DSD's distributorship, and DSD values its distribution rights at approximately $850,000. (Pl.'s Opp'n 3, 5.) Additionally, Hansen contends the amount-in-controversy requirement is satisfied "because DSD seeks to reopen the arbitration and obtain a damage award of approximately $1.7 Million." (Id. at 5.)

In Theis Research, Inc. v. Brown & Bain, 400 F.3d 659, 661 (9th Cir. 2005), the Ninth Circuit was asked to determine whether the amount-in-controversy requirement for diversity jurisdiction was "measured by the amount of the [arbitration] award or by the amount in dispute in the underlying litigation between the parties." The plaintiff had moved to vacate an arbitration award of zero dollars, and at the same time the plaintiff also filed a complaint seeking damages for substantially the same claims asserted in the underlying arbitration. Id. The court held that the amount in controversy was met because the plaintiff was seeking to obtain $200 million in damages, which equated to a request to reopen its arbitrated claims: "Although neither Theis nor B & B asked that the arbitration proceedings be reopened, Theis sought to obtain by its district court complaint substantially what it had sought to obtain in the arbitration. Theis simply chose to 'reopen' its claims in the district court rather than in arbitration." Id. at 665.

In reaching its conclusion, the Theis Research court noted that there is a split among the circuits on this issue, and in general "the cases have turned upon whether the party seeking to vacate an arbitration award also sought to reopen the arbitration." Id. at 664 (citing cases). The court cited Baltin v. Alaron Trading Corp., 128 F.3d 1466 (11th Cir. 1997), in which the court found the amount in controversy was not met where the plaintiffs sought to vacate an arbitration award requiring them to pay $36,284.69 but did not seek to reopen arbitration, because "[t]he maximum remedy sought by the Baltins was the vacatur of the arbitration award" which did not meet the jurisdictional minimum. Theis Research, 400 F.3d at 665.

The same result was reached in Ford v. Hamilton Investments, Inc., 29 F.3d 255 (6th Cir. 1994), because the plaintiffs sought only to vacate a $30,524 arbitration award and

neither party sought additional damages. Theis Research, 400 F.3d at 665. The court in Ford "was quite clear that had the losing party sought to challenge the arbitrator's denial of that party's counterclaims," which were valued over the jurisdictional minimum, then the amount in controversy would have been met. Id. (citing Ford, 29 F.3d at 260; accord Peebles v. Merrill Lynch, Pierce, Fenner & Smith Inc., 431 F.3d 1320 (11th Cir. 2005) (holding amount in controversy was met where plaintiff sought to vacate a zero-dollar award and requested a new hearing before a different arbitration panel where he would seek recovery of up to $2 million).

"When a petitioner seeks confirmation or vacatur of an award, without seeking a remand for further arbitration proceedings, 'the amount in controversy is the value of the award itself to the petitioner.'" Wise v. Marriott Int'l, Inc., 2007 WL 2200704, at *4 (S.D.N.Y. July 30, 2007) (quoting N. Am. Thought Combine, Inc. v. Kelly, 249 F. Supp. 2d 283, 285 (S.D.N.Y. 2003)). If Hansen obtains all the relief requested in its Petition to Confirm Arbitration Award, it will receive zero dollars. Likewise, DSD will receive zero dollars. Thus, this case differs significantly from Theis Research and others were the amount-in-controversy requirement was satisfied by reference to damages sought in the underlying arbitration. In the present case, neither of the parties are asking this Court for an order reopening arbitration or awarding damages. Contrary to Plaintiff's assertion, DSD has not sought to reopen arbitration proceedings through the litigation in this Court. The Court notes that the situation might be different if DSD were pursuing a motion to vacate the award and reopen arbitration in this Court rather than Wisconsin state court. However, the only thing pending before this Court is Hansen's request to confirm a zero-dollar arbitration award. See Theis Research, 400 F.3d at 664 (finding that "the amount in controversy is the amount Theis sought to recover by its complaint.").

Plaintiff also asserts that the arbitration award included the equivalent of a "declaratory judgment" that DSD's distributorship cannot be terminated by Hansen. (Pl.'s Opp'n 5.) Thus, Plaintiff contends the Court must look at the value of the distributorship rights in determining the amount in controversy. (Id.) "In actions seeking declaratory or

injunctive relief, it is well established that the amount in controversy is measured by the value of the object of the litigation." Hunt v. Wash. State Apple Adver. Comm'n, 432 U.S. 333, 347 (1977) (citations omitted). The "object of the litigation" is measured by the "pecuniary result to either party which the judgement would directly produce." In re Ford Motor Co./Citibank (South Dakota), N.A., 254 F.3d 952, 958 (9th Cir. 2001) (citing Ridder Bros., Inc. v. Blethen, 142 F.2d 395, 399 (9th Cir. 1994)). Under this reasoning, Hansen believes the amount in controversy is $850,000 because DSD's expert estimated the company's existing distribution rights at that value. (Pl.'s Opp'n 4-5 & n.4.)

Hansen's argument is unavailing because a petition to confirm an arbitration award is fundamentally different from a complaint for declaratory relief. Cf. X-Rite, Inc. v. Volk, 2008 WL 1913926, at *1 (W.D. Mich. Apr. 28, 2008) (stating that arbitration suits "are on a different legal footing than declaratory actions"). The final arbitration award included findings that DSD was a "dealer" under Wisconsin law and that Hansen had not shown good cause to terminate the distributorship contract. The award did not provide a declaration that DSD is entitled to retain its distributorship contract in perpetuity. Any effects that flow from the arbitrator's determination of the rights of the parties, including the continuation of the distributor arrangement or the future termination of the contract, are collateral consequences of the arbitration award. "[J]urisdiction depends upon the matter directly in dispute in the particular cause, and the court is not permitted, for the purpose of determining its sum or value, to estimate its collateral effect." Quinault Tribe of Indians v. Gallagher, 368 F.2d 648 (9th Cir. 1966) (citations omitted). Future profits to be gained from the distribution contract are collateral to the present case and cannot be considered in determining the amount in controversy for jurisdictional purposes. Because DSD's earnings under the distribution contract are not directly at stake in this litigation, Hansen cannot establish the amount in controversy requirement by relying on the value of the company's distribution rights.

III. Conclusion

For the foregoing reasons, **IT IS HEREBY ORDERED** that Defendant's motion to dismiss for lack of subject matter jurisdiction is **GRANTED**. Because the Court finds that it

lacks jurisdiction, it need not consider Defendant's alternate argument that the case should be stayed under doctrines of judicial abstention.

IT IS SO ORDERED.

DATED: December 12, 2008

HONORABLE LARRY ALAN BURNS
United States District Judge